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CAPITAL BANK AND TRUST COMPANY

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Senior Vice President,
General Counsel and Secretary

October 2, 2000

Manager
Dissemination Branch
Information Management and Services Division
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attention 1550 -0023

2000 OCT -3 A 11:48
DISSEMINATION
OFFICE OF THRIFT SUPERVISION
WASHINGTON, D.C.

Re: Proposed Revisions to the Thrift Financial Report (TFR)

Dear Sir or Madam:

I am writing on behalf of Capital Bank and Trust Company ("CB&T"), a recently chartered federal savings bank located in Brea California, to provide comments on the proposed revisions to the Thrift Financial Report (TFR) that would be effective for the March 31, 2001 report. Our comments relate to two proposed schedules: Schedule FS--Fiduciary and Related Services and Schedule HC --Thrift Holding Company.

Schedule FS—Fiduciary and Related Services

A new schedule has been proposed to collect information on trust activities for those thrifts with fiduciary assets greater than \$100 million or fiduciary income greater than 10% of their combined net interest and non-interest income. This schedule would replace the Annual Report of Trust Assets and would be filed quarterly as part of the TFR.

Under the proposed Schedule FS, a thrift with a grant of "fiduciary powers" that exercises those fiduciary powers must complete the information requested on the Schedule. This information includes assets and accounts in various categories of "Fiduciary and Related" Accounts. However, neither the Schedule nor any proposed instructions to the Schedule provides guidance on how the Schedule is to be completed and what types of accounts fall within the different categories included on the Schedule. For example, the Schedule does not specifically define the terms "managed and unmanaged accounts" and "fiduciary powers."

In the case of an institution such as CB&T which exercises no discretion with respect to the investment or administration of the retirement plan accounts for which it serves as directed trustee, we would conclude that the thrift does not have and does not exercise

any fiduciary powers. As a result, only the first line item on the form would be completed – with a “No” response. No additional information would be provided regarding assets and accounts described as “Fiduciary and Related Assets.”

We urge a clarification of the Schedule that would define “fiduciary powers” to specifically exclude the activities of a non-discretionary trustee. Because these duties are essentially identical to those of an institution that provides solely custodial and other administrative duties, the assets and accounts of a non-discretionary trustee should not be included in Schedule FS, except perhaps in the line item for “Custody and Safekeeping Accounts.”

As noted in our previous comment letter, dated April 28, 2000, the conclusion that a non-discretionary trust account should be treated as a non-fiduciary account is supported by existing banking regulations. Moreover, the preamble to the proposal for the new TFR specifically states the OTS intention “to adopt the same schedule on trust activities that has been proposed by the other banking agencies.” A uniform concept of “fiduciary activity,” as defined in existing banking regulations is intended.

The current regulations of the Office of the Comptroller of the Currency (OCC) provide significant guidance on the definition of “fiduciary capacity.” For example, in the preamble to the regulations at 12 CFR section 9.2(e) (61 FR 68543, Dec. 30, 1996), the OCC uses investment discretion as a test of fiduciary capacity: “[T]hus the proposal defined fiduciary capacity to exclude relationships (other than those listed in the statute) in which the bank does not have investment discretion.” The preamble goes on to state that neither non-discretionary investment advisory activities nor non-discretionary custodial activities are treated as fiduciary activities under the OCC regulations. “The OCC does not treat non-discretionary custodial activities as fiduciary, and the final rule continues that approach.” (Footnote 4, 61 FR 68543, Dec. 30, 1996).

Although the OTS regulations at 12 CFR Part 550 do not distinguish between a discretionary and non-discretionary trustee, these regulations do distinguish between certain types of trustees. In Subpart E, the regulations state that a bank trustee of a retirement plan or IRA or a trustee of a fiduciary account that involves no active fiduciary duties may act in a fiduciary capacity without obtaining OTS approval. Existing OTS regulations, therefore, appear to recognize that a trustee can act in a non-fiduciary capacity, and that less oversight is needed in such cases.

As demonstrated by the above references, existing banking regulations support the conclusion that non-discretionary trust services provided by CB&T, which exercises no investment or administrative discretion, should be treated as non-fiduciary activities not reportable on Schedule FS. The activities of CB&T are not fiduciary activities and if reported at all on Schedule FS, should be included in the line item for Custody and Safekeeping Accounts.

We further note that the function rather than the mere title of an institution holding retirement plan assets should determine whether the assets are held in a fiduciary capacity. A non-discretionary trustee such as CB&T could, for example, provide the exact same services to its IRA clients as either a "trustee" or "custodian." By simply using a custodial agreement rather than a trust agreement or by amending its trust agreement to a custodial form, the role of a bank holding substantial IRA accounts could be changed from that of a "trustee" to a "custodian." Such an amendment would represent a mere change of form that would have no effect on the rights or obligations of either the bank or the IRA participants. It should not, therefore, determine the manner in which the institution completes the proposed Schedule. Regardless of its title as trustee or custodian, a bank should report its non-discretionary IRA assets and accounts only as non-fiduciary custody and safekeeping accounts.

We similarly note that there is essentially no distinction between the services provided by CB&T as a non-discretionary trustee to certain plans and as custodian to other plans. CB&T serves as a custodian to retirement plans maintained under sections 403(b) and 457 of the Internal Revenue Code, but as non-discretionary trustee to the plans maintained under section 401(a) of the Code. The services to these different types of arrangements differ only in the case of the IRS form on which distributions are reported. There are no substantive differences in the services rendered to the plans by CB&T in its capacity as non-discretionary trustee v. its capacity as custodian.

For the reasons set forth herein, we urge the OTS to clarify the information required on proposed Schedule FS. Assets and accounts held by thrifts in non-discretionary trust and custodial accounts should not be treated as "fiduciary assets" and should be reported only as "custody and safekeeping accounts."

Proposed Schedule HC – Thrift Holding Company

This new proposed schedule would require the disclosure of holding company financial information on a quarterly basis as part of the TFR. Confidential treatment is not proposed to be afforded to Schedule HC, as the proposal states that only Schedules PD, VA and CMR would not be made public.

CB&T requests that the holding company financial information required on Schedule HC be subject to waiver by the appropriate Regional Office of the OTS, as is currently permitted with respect to the financial information required under the H-(b)11. Currently, OTS Regional Offices have flexibility to modify the financial disclosure requirements applicable to holding companies, if such reporting is overly burdensome or otherwise reported to the OTS. Particularly in the case of a thrift holding company which is not a public company and whose financials would not otherwise be subject to public

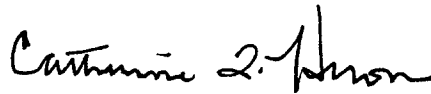
disclosure, we urge the OTS to accommodate other financial reporting arrangements that may have been developed with the appropriate Regional Office. In such cases, a requirement of public disclosure of material financial information of the holding company would be overly broad and unnecessary to accomplish the purposes set forth in the preamble to the proposal.

In the alternative, we urge the OTS to specifically state that proposed Schedule HC will not be made available to the public and will not be subject to disclosure under the Freedom of Information Act. Any lesser standard of protection could seriously jeopardize the financial well-being of a non-publicly traded thrift holding company.

Conclusion

We appreciate the opportunity to comment on behalf of CB&T on the proposed revisions to the TFR for March 31, 2001. We would be glad to provide any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine L. Heron". The signature is fluid and cursive, with a large initial "C" and a stylized "H".

Catherine L. Heron